Before the
FEDERAL COMMUNICATTIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Reexamination of the Comparative Standards for	)	**MM Docket No. 95-31**
Noncommercial Educational Applicants	)	
	)	
(Second Further Notice of Proposed Rulemaking	)	

To the Commission:

Comments of the State of Oregon

The State of Oregon, Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University (hereafter, "State of Oregon"), through its counsel, files these Comments with respect to the *Second Further Notice of Proposed Rulemaking*, 2002 FCC LEXIS 928 (Feb. 25, 2002) (hereafter, "*NPRM*"), in the above-captioned proceeding. The State of Oregon is filing these Comments in order to express its continuing concern that this *NPRM* indicates an intention on the part of the Federal Communications Commission ("Commission" or "FCC") to further marginalize noncommercial educational broadcasting by barring it from all AM frequencies and most of the FM band.

I Introduction.

On behalf of Southern Oregon University, the State of Oregon presently holds licenses for 10 NCE FM stations and two NCE AM stations. It operates another NCE AM station under an LMA through a related entity, has entered into purchase agreements for three more AM stations, which will operated noncommercially, and has signed a letter of intent to acquire one additional soon-to-be-NCE AM station. Thus, before the end of the year, the State of Oregon will be operating six noncommercial AM stations, which will bring the total number of AM NPR

member stations to 42. With one-seventh of that total, the State of Oregon will be the largest single AM public radio licensee.

The State of Oregon, which has held licenses for NCE stations since 1969 and has been a member of National Public Radio since 1979, views its public broadcasting service as an intrinsic part of the State's educational program. The State has increasingly sought to ensure that all its citizens, and others who seek educational services from its institutions, have access to public radio service, even in remote rural areas. The State of Oregon firmly believes that ensuring such access to all U.S. citizens is also an intrinsic aspect of the Public Broadcasting Act, and of the public interest requirements of the Communications Act .

The State of Oregon has expressed this same concern in previous Comments and Reply Comments that it filed with respect to the *Further Notice of Proposed Rulemaking* in this proceeding, and through its participation as one of the petitioners in *National Public Radio et al. v. FCC,* 254 F.3d 226 (D.C. Cir. 2001), which successfully challenged the Commission's former requirement that NCE applicants for non-reserved band stations must participate in competitive bidding auctions for such stations. For the same reason, the State of Oregon became and remains one of the Petitioners in the currently-pending Petition for Review proceeding before the U.S. Court of Appeals for the D.C. Circuit (*American Family Association, et al., v. FCC,* Case No. 00-1310), in which it challenges certain aspects of the Commission's Order with respect to the proposed point system for NCE applicants in *Reexamination of the Comparative Standards for Noncommercial Educational Applicants,* MM Docket No. 95-31 ("Order"), 15 FCC 7386 (June 6, 2000).

In the present *NPRM*, the Commission proposes to bar NCE stations from not only the non-reserved FM band, but also from the entire AM band – relegating these stations to a small NCE ghetto, while the Commission proceeds with what it now apparently perceives as its true mission – selling the remainder of the radio frequencies under its authority to the highest bidder, while permitting ever-greater levels of concentration in media ownership.

II Reasons for Filing These Comments.

The State of Oregon opposes all three options that the Commission has proposed for dealing with situations where NCE entities apply for stations in the non-reserved band. Before the specific deficiencies of each option can be discussed in any detail, however, some underlying problems with the Commission's approach to this issue must be addressed. In the first place, as in the previous *Further Notice of Proposed Rulemaking,* 13 FCC Rcd 21167 (1998*)* in this proceeding (regarding which NPR, the State of Oregon and others filed the petition for review that resulted in the *NPR v. FCC* decision), the Commission has again misconstrued section 309(j) of the statute, 47 U.S.C. §309(j). Here, however, the misinterpretation is not limited to subsection 309(j)(2). Rather, as the Commission's three proposed "options" demonstrate, the Commission has now completely misinterpreted the scope of the authority granted to it by Congress with respect to competitive bidding for non-reserved channels. As these Comments will demonstrate, the Commission's reading of section 309(j)(1) is entirely too expansive and its approach to the issue of NCE applicants for the non-reserved band is misguided and contrary to Congressional intent. The statute did not hand the Commission blanket authority to sell the entire non-reserved radio and TV bands. Rather, in crafting this statute, Congress carved out a discrete set of circumstances under which was deemed appropriate for the Commission to exercise the competitive bidding authority conferred by subsection (j)(1). Those circumstances that call for competitive bidding occur, under the statutory scheme, only when all mutually exclusive applicants for a channel in the non-reserved band intend to operate the station commercially.

Secondly, the *NPRM* demonstrates that the Commission, contrary to the express purposes of the Public Broadcasting Act, 47 U.S.C. 396, *et seq.,* apparently considers public broadcasting somehow less valuable that commercial broadcasting. The Commission also seems to view competitive bidding for non-reserved band stations as an end in itself, rather than a means for making licensure determinations within a discrete subset of applicants for such stations – operators of commercial radio and TV. These attitudes are manifested in a Commission proposal

that both discriminates in several ways against NCE broadcasters and thoroughly misinterprets the statute's directives.

Furthermore, the State of Oregon is quite concerned by the Commission's complete failure in this *NPRM* to deal with public radio access to the AM band. The proposed three options would permanently "reserve" the AM frequencies[1], as they become available, for the exclusive use of commercial entities. As a result, in the future, AM stations would only be available to NCE entities by purchase from an existing licensee. Option #1 would make NCE broadcasters ineligible to apply for any frequency within the entire non-reserved spectrum [defined in the *NPRM* as including "non-reserved FM (including translators) channels, TV channels, all AM frequencies, and all secondary TV services"], while Option #2 would – somewhat grudgingly -- permit NCE entities to apply for non-reserved frequencies but, again, would give an absolute preference to commercial applicants. Option #3, which would supposedly ameliorate the situation created by Options #1 and #2 by allowing reservation of channels in the Table of Allotments, would (as the Commission acknowledges in note 40) explicitly limit such reservation opportunities to the FM band.

The Commission's supposed "explanation" regarding why NCE entities should be barred from applying for AM frequencies – that the AM service is crowded and has interference problems that will not be relieved by the creation of an expanded AM band – does not explain, or even address, why only NCE applicants should be so barred.[2]

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[1] The State of Oregon is, of course, aware that the AM band is a mature service and that the Commission does not allocate "new" frequencies in the same manner as FM channels. However, as the Commission, its staff, and industry members know, AM stations which are unprofitable are not infrequently abandoned by commercial licensees, in which case such frequencies would, at least theoretically, become available for disposition pursuant to section 309(j). If any of all of the Commission's proposed options were adopted, however, such frequencies would not be available to NCE applicants.

[2] It is difficult to discern any principled basis for the artificial distinction the Commission makes between the AM and FM bands with respect to NCE stations and NCE-station applicants. In the first place, the Public Broadcasting Act is completely neutral with respect to AM or FM channels. Secondly, as discussed in these Comments, AM stations have been an intrinsic part of noncommercial broadcasting since the earliest days of radio. And, finally, one of the Commission's own standardized forms, FCC Form 302-AM, was recently revised to add a box which an applicant could check in order to indicate intended noncommercial usage of the AM frequency for which it sought licensure. On what basis, then, does the Commission believe it is authorized to now declare AM stations off-limits to NCE applicants?

The State of Oregon's experience with operating AM stations has enabled it to recognize the technological significance and potential expansion value that AM radio provides for public radio stations and listeners. It is greatly concerned by the Commission's apparent plan to post a very large and permanent "NCE need not apply" sign on the AM band. Nowhere in the statute or its legislative history is there any indication that Congress intended its exemption of NCE applicants from competitive bidding to result in such applicants' permanent relegation to a small portion of the FM band and complete ineligibility to operate anywhere on the AM band. Such an interpretation of this statute would permanently stifle the growth and development of public radio, and would violate the letter and spirit of the Public Broadcasting Act and, indeed, of section 309(j) of the Communications Act.

It would also lead inevitably to an intensification of the very worst trends that currently afflict commercial broadcasting: concentration of ownership in fewer and fewer hands[3], the associated decrease in diversity of ownership, and today's "vast radio wasteland" of lowest common denominator programming. Thus, it is not only the potential importance of the AM band to noncommercial radio that motivates the State of Oregon to file these Comments. As an educator, it also wishes to stress the importance of noncommercial radio to the AM band.

III Noncommercial Broadcasting and Non-Reserved Frequencies

However basic it may seem, it is worth pointing out – and keeping in mind – that the frequencies at issue under the Balanced Budget Act of 1997 should be designated as "non-reserved" (to distinguish them from reserved-band stations), rather than as the "commercial band," as the Commission seems to believe. When Congress granted the Commission the

[3]The Commission's scheduling of the *Gowdy/Clear Channel* application for hearing, in which market dominance of Clear Channel will be examined, arising as it does in the context of the Commission's "anything goes" attitude in recent years toward concentration in the commercial radio market, is reminiscent of Inspector Renault (Claude Rains' character), in *Casablanca*, who professes himself "shocked - *shocked*" to discover gambling at Rick's -- as he pockets his winnings.

authority to resolve certain mutually-exclusive applications for non-reserved band channels by means of competitive bidding, it did not automatically designate the non-reserved band as the exclusive province of commercial broadcasting and commercial broadcasters. This *NPRM*, however, reads as if the Commission today viewed the spectrum as containing a small noncommercial reserved band on the lower end of FM frequencies and a relatively few TV channels, and a large "reserved-for-commercial" band that encompasses all of AM, most of FM, and most of the TV spectrum. This is not what Congress intended, as the statute makes clear.

Some historical perspective, and a look at what exists today, might be useful. Although, historically, noncommercial educational broadcasters were the pioneers of radio on the AM as well as the FM band, the decades since then have seen a decline in the number of AM public radio stations. Where there were once nearly 150 public radio stations on AM frequencies, that number has shrunk drastically in recent years. Today, 49 NPR stations are on non-reserved FM channels, and, as indicated above, approximately 42 NPR-member stations will be on AM frequencies by the end of 2002. Many of the latter, however, are newly reclaimed from the commercial band. Of that original 150 NCE AM stations, probably no more than 15 remain in operation. The majority of NCE AM stations today are of recent vintage. Obviously, although the technical and engineering issues for AM and FM channels differ, and although the AM service is crowded and subject to interference, a new trend to bring public radio back to AM listeners is developing.

As the State of Oregon is discovering through its experience as an AM licensee, channels in this band hold great promise for public radio. Listener response to Jefferson Public Radio's ("JPR") AM stations, which offer the JPR *News and Information Service* programming, has been exceptionally strong. While JPR has long been among the nation's public radio stations with the highest listener penetration, JPR's *News and Information* AM radio stations attract nearly as many radio listeners as do JPR's FM stations. Thus, JPR listeners have clearly indicated that AM is a highly competitive and important outlet for public radio. Indeed, such expressions of interest has motivated JPR, and the JPR Foundation, to expand their use of AM stations to extend and

expand public radio service to Oregon and California communities.

Another significant factor in the mountainous regions served by Jefferson Public Radio is AM radio's relative immunity to the multipath propagation interference factors, which significantly affect FM signal delivery in southern Oregon and northern California. AM radio's ability to successfully traverse mountains and penetrate canyons provides the opportunity to receive public radio service for some communities and individuals who might otherwise have NO access to public radio signals provided solely by FM stations or FM translators.

IV What is an NCE Broadcast Station/Public Broadcast Station?

This *NPRM* provides a sad commentary, which is more than a little ironic, on the Commission's attitude toward public broadcasting. Today, in this *NPRM*, 85 years after the first noncommercial AM station (9XM, now known as WHA) went on the air, nearly 22 years after passage of the Public Broadcasting Act became law, and two years after the FCC cravenly withdrew its guidance regarding what constitutes noncommercial educational programming in the Order on Reconsideration in *WQED Pittsburgh*, the FCC for apparently the first time discovers a need to seek comment on the meaning of the terms "noncommercial educational broadcast station" and "public broadcast station" as used in 47 U.S.C. § 397(6) and in Rules 73.621(a) and 73.503(a). The Commission now professes itself unsure regarding whether mere nonprofit educational status alone renders an organization exempt from auctions, or whether that status, together with a showing of advancement of an educational program, must be present in order for an entity to be accorded NCE/public broadcasting status for purposes of exemption from competitive bidding requirements. The State of Oregon considers it highly disingenuous for the Commission to finally take the position that program content matters, but to do so only in the context of protection of NCE applicants from its competitive bidding authority.

The definition of educational programming in the context of noncommercial *educational* broadcasting has been steadily eroded for many years by the Commission's failure to take a strong position on the issue. Today, in the aftermath of *WQED Pittsburgh,* any notion that

educational program content is an intrinsic part of educational broadcasting has essentially been abandoned by the Commission. In light of the non-principled "distinction" between NCE radio and NCE TV in the Commission's initial decision, *WQED Pittsburgh*, 15 FCC Rcd (1999), and the Commission's subsequent (and also non-principled) hasty retreat, in its Order on Reconsideration [15 FCC Rcd 2534 (2000)] from the guidelines that would have helped determine whether an NCE applicant would actually advance an educational program, one wonders what a "showing of advancement of an educational program" would today consist of, or whether that showing would make a substantive difference. Thus, the question of whether this element is or should be part of the "description" in §397(6) is essentially a straw man issue.

On one level, the questions posed by the Commission regarding interaction of sections 309(j)(2) and 396(7) present a relatively simple exercise in statutory construction. Section 309(j)(2) exempts "stations described in section 397(6)" from the "competitive bidding authority" that Congress granted to the Commission in subsection 309(j). Section 397(6) defines the terms "noncommercial educational broadcast station" and "public broadcast station" as "a television or radio broadcast station which–

"(A) under the rules and regulations of the Commission in effect on the effective date of this paragraph [Nov. 2, 1978], is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or

"(B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes."

Thus, from the perspective of standard rules of statutory construction, section 397(6) does, in fact, incorporate the Commission rules 47 C.F.R. § 73.503(a) and 47 C.F.R. § 73.621(a) by definition. These rules include two elements: NCE radio stations are to be licensed only (1) to a "nonprofit educational organization" and (2) "upon a showing that the station will be used for the advancement of an educational program." The NCE TV rule similarly goes beyond the first requirement of nonprofit educational organizations as licensees to also require "a showing

that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television service."

This statutory provision thus expressly incorporates the Commission's rules that govern whether an entity is "eligible to be licensed . . . as a noncommercial educational radio or television broadcast station." The descriptions of NCE radio and TV stations in the rules in question have two elements: the nonprofit educational nature of the entity to be licensed as an NCE station and the educational nature of the programming to be broadcast – that is, a "showing that the station will be used for the advancement of an educational program" (for radio) and a similar "showing" for NCE TV stations. 47 C.F.R. §73.503(a), 73.621(a). By exempting stations "described" in §397(6) without limiting that reference to any specific aspects of those statutory descriptions, the plain and unambiguous meaning of the section 309(j)(2) would appear to encompass both elements of these Commission's rules.[4]

In fact, there is no need for the Commission's tortuous attempt to divide that description into two separate elements and then speculate on the possible effects of each in the context of exemption from competitive bidding. The straightforward definition in the statute encompasses the entire description of what makes an entity eligible. Only if a statute is silent or ambiguous is it necessary to immerse oneself in the types of interpretation that the Commission postulates, and this statute [as the Court of Appeals held in *NPR v. FCC,* 254 F3d 226 (2001)] is neither. See also, *Chevron USA, Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

It is, in fact, curious that the Commission has made such a strenuous effort to parse the statute and its own rules in this manner. Part of the Commission's problem arises from the fact

[4] Section 397(6) provides the same definition for both terms, "NCE broadcast station" and "public broadcast station." If, however, all NCE stations were also public stations, perhaps the question of whether a station "advanced an educational program" would be clearer, for it would be intrinsic to the definition, inasmuch as public radio and TV stations clearly provide an educational program in the sense intended by section 397(6). However, over the past several years, the Commission has permitted numerous entities that barely satisfy the "nonprofit" entity portion of the definition, with only the flimsiest "showing" of an educational program to claim NCE status. Such claims are seldom, if ever, investigated or challenged.

that it continues to treat subsection 309(j)(1), the general requirement for competitive bidding, as if it were the only portion of the Balanced Budget Act of 1997 that it is required to effectuate, when, in fact, as the D.C. Circuit pointed out, 309(j)(1) simply states a general rule that contains exemptions and limitations and the Commission must obey the full congressional directive. As the Court chided the Commission in *NPR v. FCC,* "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *NPR v. FCC*, 254 F.3d at 230, citing *Rodriguez v. U.S.,* 480 U.S. 522 (1987).

This, however, is the type of simplistic mistake that the Commission makes throughout this *NPRM*. The Commission continues to read the entire statute only in light of the authority granted in section 309(j)(1), rather than also giving effort to the rules for construction and limitations that Congress expressly wrote into other sections of this statute. The Commission apparently continues to believe erroneously, that some conflict exists between the general rule of subsection (j)(1) and the exemptions provided by subsection (j)(2).

The exemption of NCE stations was clearly intended by Congress as a benefit to NCE stations, to protect them from having to bid competitively against commercial applicants, not as a device to ban NCE stations from the non-reserved frequencies. Nothing in the Balanced Budget Act of 1997 provides any basis for the Commission's apparent interpretation. The Commission's three options would result in effectively barring NCE stations from applying for most FM and all AM stations, making them essentially ineligible (or less eligible than commercial entities) to be granted a frequency within the non-reserved band.

The Commission seems very confused on this point, however. It seems to have confused its limited competitive bidding authority, which provides one means of disposing of non-reserved stations, with the right to apply for non-reserved stations under any circumstances or to award them by any other means. This confusion is evidenced in the *NPRM* by statements such as "*could not* participate in an auction" and its speculation about non-existent issues, such as whether an NCE station would be "precluded . . . from providing noncommercial educational service if it did participate in an auction." *NPRM,* 2002 FCC Lexis 928 (at pp. 4-5 of

Commission's printed text). A more logical interpretation of this statute, one fully in line with Congressional intent, is that the exemption from being required to participate in competitive bidding was intended as a benefit to NCE applicants, rather than a ban or a handicap on NCE applications. This relief from competitive bidding for an NCE entity to obtain a license for a non-reserved channel should be viewed similarly to the exemption from paying application fees that NCE applicants presently enjoy. In each case, the NCE applicant is exempted from incurring a particular expense, but that limited exemption does not bar the entity from applying or from being granted a license for the station.

The Commission has read too much into the limited grant of competitive bidding authority conferred by Congress in subsection (j)(1). It ties itself into knots trying to reconcile that authority, along with its obligation under subsection (j)(3)(C) to "recover a portion of the value of the public spectrum made available for commercial use and [to avoid] unjust enrichment," with subsection (j)(2)'s exemption.[4] Actually, subsection (j)(3)(C) is an important aid toward reconciling the general rule and the NCE exemption, since NCE licensees on the non-reserved spectrum will not be making "commercial use" of that resource and will not be "unjustly enriched" by whatever method the Commission may develop for awarding licenses for non-reserved channels to NCE applicants.

V Putting the Competitive Bidding Authority into Perspective

Section 309(j)(1) must be read in its context as part of the entire Balanced Budget Act. Other subsections and paragraphs of 309(j) were clearly intended to modify and provide rules of

[4]Interestingly, the Commission seems to have no such problem reconciling subparagraph (j)(2)(B) with subsection (j)(1). In this subparagraph, Congress created a similar exemption for all TV licensees "for initial licenses or construction permits for digital television service," even though this exemption provides for a more far-reaching and extensive giveaway of the public spectrum resource than will result from developing and applying an alternative methodology that can be used for NCE applicants for non-reserved channels.

interpretation for the authority granted by subsection (j)(1). For example, as discussed above, subsection (j)(3), which requires the Commission to design systems for competitive bidding, requires the Commission nevertheless to continue to guard and protect the public interest and to follow several specified objectives. One of these is (B) promoting economic opportunity and competition "by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants . . . " As noted, "recovery . . . of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment . . . " is likewise an objective. But, note the significance in this subparagraph of the term "commercial use." It is the use to which a broadcast station is put that is determinative of whether the entity that applies for it should be subjected to the Commission's competitive bidding authority.

As the Commission knows, nonprofit organizations may own and operate broadcast stations on a commercial basis. For example, religious and other non profit entities have for years owned and operated commercial stations while remaining nonprofit. As the Commission explained in the *KQED, Inc.* decision, "a licensee's nonprofit status is determined by the disposition of its income, i.e., none to 'any private shareholder or individual' and not by the source of that income[.]" *KQED, Inc.,* 88 FCC 2d 1159, 1162, 50 RR 2d (P & P) 1349 (1982).

The Commission, however, seems confused about what nonprofit entities may or may not do, as is demonstrated by its inquiries regarding the definition and description of NCE entities and licensees. While section 397(6) and the rules provide that noncommercial FM and TV stations [i.e., reserved band] shall be licensed only to "nonprofit educational organizations . . . that advance an educational purpose," no statute or regulation states that NCE organizations may only hold the license for noncommercial FM and TV stations. Similarly no statute or regulation prohibits a nonprofit educational entity from holding a license and operating a station on a non-reserved frequency, whether the station and its programming is commercial or non-commercial.

Obtaining and holding a license for a station on a non-reserved frequency, as opposed to participating in an auction as the methodology for obtaining a license for a non-reserved

frequency, are two entirely different concepts, yet the Commission consistently throughout the *NPRM* confuses these concepts. This *NRPM* gives the impression that the Commission believes that section 309(j) somehow re-designated the non-reserved band as being reserved for commercial use only, leaving a small noncommercial ghetto to which entities that are nonprofit and broadcast a noncommercial service are confined. Of course, nothing could be further from the truth. The purpose of setting aside the reserved band was to ensure that ***at least*** those stations would be available for noncommercial broadcasting and programming, not to reserve everything else – including the entire AM band – for commercial programming by commercial broadcasters. Nothing in the Balanced Budget Act has changed that long-term policy.

VI Consideration of the Commission's Three Options

The Commission has proposed three options for how it might deal with noncommercial applicants for non-reserved frequencies. None of these options are satisfactory. They result from a misinterpretation of the statute and a failure to observe and follow Congressional directives that limit the competitive bidding authority conveyed in § 309(j)(1).

The first option would punish NCE entities by banishing them from the non-reserved band simply because Congress chose to spare them from having to bid at auction for new station licenses. This option results from a misinterpretation of the limited statutory authority granted by subsection (j)(1) and, in fact, is an unjustified expansion of that limited authority. Congress has not granted the Commission the right to penalize NCE stations. Rather, it simply authorized the Commission to use competitive bidding as one type of methodology for making determinations about applicants who propose a commercial use for non-reserved frequencies. This option both violates the statute by over-expanding the Commission's authority and is arbitrary and capricious. The Commission fails to point to any statutory basis for making the leap of interpretation it has made. The effect of this option would be to lock NCE entities up in the noncommercial ghetto mentioned above, banning them from most of the FM band, and all of the AM band.

The second option, which would grudgingly permit NCE entities to apply for any stations on the non-reserved band that no one else wants, suffers from the same statutory infirmity, the same over-expansion of authority beyond that conveyed by the statute, and is likewise arbitrary and capricious. The only difference between options one and two is that the second option pretends that there may be a few leftovers, once the commercial applicants buy the frequencies they want, which can be offered to NCE entities as a consolation prize. In all other respects, option #2 will likewise bar NCE entities from expanding their service outside the FM reserved band.

The third option is clearly intended for use along with either Option #1 or #2. It would permit NCE entities limited access to the non-reserved band (which the Commission has now, obviously, come to view as the "commercial band") if certain conditions could be satisfied. This reservation could only be done, however, through the Table of Allotments. This means that the only non-reserved channels available to for reservation by NCE entities under this option would be in the FM band, with no means for access to AM channels that might become available for license application, since no process for reserving channels for NCE use through a Table of Allotments has ever existed for AM channels. Thus, even though the *NPRM* mentions the Commission's creation of an expanded AM band (n. 39, *NPRM,* and accompanying text), that expanded band would nevertheless be off-limits to NCE applicants under option #3, which would only permit reservation of non-reserved channels through the FM Table of Allotments. And even this limited non-reserved FM access would be limited to situations where the NCE entity would provide a first or second radio or TV NCE service.

The Commission's limitation of this opportunity to such situations would prevent competition and diversity among NCE stations, as well as between NCE and commercial stations. The Commission cannot disingenuously pretend that all NCE programming is fungible. A community may already be within range of one or two NCE FM stations, but both stations might be religious broadcasters. In such circumstances, a nonprofit entity that wished to provide NPR programming for that community would be barred from reserving the frequency because it

would not be providing the required first or second service. Thus, even with the third option, NCE entities are penalized because they are not permitted the freedom accorded to commercial entities to apply for any frequency in the non-reserved band. This proposal, as noted above, does not promote diversity or competition and thus, does not serve the public interest or the objectives that Congress has directed the Commission to consider and that limit its exercise of competitive bidding authority.

What is most frustrating about the Commission's three narrow, unimaginative, and punitive options is that they disregard other subsections of section 309(j), even though Congress was quite explicit in directing the Commission to recognize the limitations of its authority under §309(j)(1). Several subsections of section 309 provide guidance on how Commission should implement that authority. One way of evaluating the Commission's three proposed options is to weigh them against the guidance provided in these sections.

A. The § 309(j)(2) Exemptions.

The D.C. Court of Appeals has already explained to the Commission how the latter misinterpreted the exemption language of subsection 309 (j)(2). Regardless of this recent instruction, Commission has once again, in this *NPRM*, misconstrued the language of the exemption. This subsection reads: **"The competitive bidding authority . . . shall not apply to . . ."** What this means is that the Commission *lacks the authority to require* competitive bidding as the means or methodology whereby licenses or construction permits are awarded in the three situations described in subsections (A),(B), and (C). It does ***not*** mean that the parties that Congress has exempted from that authority should be barred (or could be barred) from acquiring station licenses and construction permits by means other than competitive bidding.
The exemption relieved NCE applicants from one type of process, a process that Congress had decided to require of commercial applicants; it did not deny them access to non-reserved stations. Nothing in the statute can be construed to prevent these exempted parties from

continuing to apply for stations and be granted stations on the non-reserved band -- all it does is protect them from having to do so through competitive bidding.

This section is a limitation on the Commission, not on the parties that have been exempted. The Commission has, once again, completely misunderstood Congressional intent and misconstrued the statute. Worse, by equating competitive bidding with the granting of licenses (that is, by equating the means with the result), the Commission has grossly misinterpreted and expanded its authority beyond what Congress clearly intended. As the Court of Appeals explained in *NPR v. FCC,* Congress did not authorize the Commission to require NCE stations to engage in auctions in order to acquire stations in the non-reserved band. Neither did Congress intend or imply that NCE stations cannot acquire or hold licenses in the non-reserved band -- they simply may not be required to bid at auction for them. The statute restricts the Commission's authority to require participation in auctions, it does not restrict NCE entities. Thus, there is no basis in statutory authority to bar or limit NCE access to non-reserved frequencies simply because Congress did not authorize the Commission to force NCE entities to compete in auctions alongside commercial entities.

B. Section 309(j)(3). Design of system of competitive bidding.

Section 309(j)(3) directs the Commission to serve various specific objectives in the process of exercising its authority under § 309(j)(1). In pertinent part, this subsection charges the Commission, as it develops regulations to implement its competitive bidding authority, with the following tasks and objectives:

> ***. . . The Commission shall seek to design and test multiple alternatives methodologies under appropriate circumstances. . . . In identifying classes of licenses and permits, in specifying eligibility and other characteristics and in designing other methodologies . . ., the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 1 of this act and the following objectives:***
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> ***** ***** *****

> ***(B) promoting economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants . . .***
>
> ***(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource.***

Note that Congress has reminded the Commission here that its primary objective must still be to serve the public interest and has directed it to build in "safeguards to protect the public interest" and to develop regulations and methodologies that promote the objectives Congress intended to serve. Banishing NCE broadcasting from non-reserved frequencies does not serve the public interest. Banishing NCE broadcasting from non-reserved frequencies does not promote economic opportunity and competition. Nor does it help avoid concentration. It narrows the field of applicants, rather than preserve a wide variety of applicants, as subparagraph (B) requires.

With respect to subparagraph (C), it is interesting that the Commission has seemingly elevated this objective over all the others. This objective, however, should be more closely examined. It directs the Commission to recover a "portion of the value of the public spectrum resource" but that recovery applies to "commercial use" of the spectrum, not to all uses, and the purpose of this objective is to avoid "unjust enrichment." This is Congress' rationale for authorizing competitive bidding: that commercial entities should no longer be able to acquire radio and TV frequencies, which are a national resource, without paying for them.

But this rationale simply does not apply to noncommercial educational broadcasters, who do not and will not make "commercial use" of the frequencies they acquire. NCE licensees will not be unjustly enriched by acquiring non-reserved band radio and TV frequencies. Rather, they will potentially enrich the cultural life and the educational resources of the nation, and are potentially a national resource themselves. As the Commission itself stated in its original *WQED Pittsburgh, Inc.* decision (and as quoted with approval by the D.C. Circuit in *NPR v. FCC,* 254 F. 3d at 225), the hallmark of NCE broadcasting (or, at least, of public broadcasting) for over 50 years has been the "high quality type of programming which would be available in such stations

– programming of an entirely different character from that available on most commercial stations." *WQED Pittsburgh and Cornerstone Television, Inc.,* 15 FCC Rcd 202 (p. 16) (1999), vacated in part by 15 FCC Rcd 2534 (2000). The D.C. Circuit went on to state: "Not restricted to this [reserved] spectrum, however, noncommercial educational broadcasters may also apply for licenses in the unreserved spectrum . . . " The Commission has provided no rationale in this *NPRM* which would lead the Court to reverse that statement.

C Rules of construction: § 309(j)(6)

Subsection 309(j)(6) provides for specific rules of construction for the Commission to follow in developing and administering its competitive bidding authority. The subsection states, in pertinent part:

> ***Nothing in this subsection, or in the use of competitive bidding, shall –***
>
> ***(A) Alter spectrum allocation criteria and procedures established by the other provisions of this Act;***
>
> ***(B) Limit or otherwise affect the requirements of . . . any other provisions of this Act***
>
> ***(C) Diminish the authority of the Commission under the other provisions of this Act to regulate or reclaim spectrum licences;***
>
> ***(D) Be construed to convey any rights . . . that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;***
>
> ***(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;***
>
> ***(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits*** . . .

Paragraphs (A) through (D) of this subsection make it very clear that the competitive bidding authority is not intended to permit the Commission to alter the way licenses are allocated in other circumstances or to alter or limit the rights of any class of licensees. The Commission did not consult or adhere to these rules of construction in developing this *NPRM*, clearly.

Particularly glaring is the failure to observe the directives of paragraph (E), which instructs the Commission that it must continue to utilize all the means at its disposal, including engineering solutions and threshold qualifications, to avoid mutually exclusive application situations. This directive makes it clear that the Commission is not relieved of its obligations to NCE applicants who might be mutually exclusive with commercial applicants for the same non-reserved frequency and cannot simply avoid dealing with the situation by banishing NCE applicants completely. If an NCE and a commercial applicant apply for the same frequency, the Commission should first attempt to devise a solution that avoids mutual exclusivity. But none of these directives seem to have been brought into play in developing the Commission's proposed options.

D Consideration of revenues in public interest determinations: § 309(j)(7)

The Commission appears to have completely disregarded the directives of subsection 309(j)(7), which reads:

> (***A) Consideration prohibited. In making a decision pursuant to section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.***
>
> ***(B) Consideration limited. In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominately on the expectation of federal revenues from the use of a system of competitive bidding under this subsection.***
>
> ***(C) Consideration of demand for spectrum not affected. Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.***

How else to explain the Commission's complete elevation of competitive bidding considerations over every other issue? How else to explain the single-minded pursuit of revenue-maximizing proposals, which would banish or severely limit NCE applicants from competing for non-

reserved band frequencies, simply because Congress has determined that such entities should not be required to bid competitively for frequencies. It is not in the public interest, convenience, or necessity to banish public radio and TV from the non-reserved band. To propose such a ban is to completely fly in the face of the public interest determination, including the consideration of the public interest served by public broadcasting, and it is a also a complete violation of this statutory directive. Any set of regulations that so single-mindedly ties the ability to participate in competitive bidding to eligibility to apply for non-reserved frequencies would run afoul of this explicit Congressional warning. Yet, it is clear from this *NPRM* that the FCC has impermissibly taken expectation of Federal revenues into account (has, in fact, made it the ultimate determinant). The Commission has elevated the ability to participate in auctions into the most important factor in eligibility for non-reserved frequencies. The FCC has thus ignored this explicit Congressional directive, as well as the other provisions and rules of construction of section 309(j).

VII The State of Oregon's Alternative Proposal

Instead of the Commission's statutorily-infirm "three options," the State of Oregon proposes the following procedure when NCE and commercial applicants appear to be mutually exclusive for the same non-reserved frequency.

First, the Commission should screen the *bona fides*, the "threshold qualifications" of all applicants. This process should include requiring would-be NCE applicants to make a valid showing of both their nonprofit noncommercial status and a genuine showing of "advancing an educational program." The Commission could permit limited discovery among all NCE applicants as a means of testing whether the required qualifications exist or are illusory. The Commission should dismiss any applicants that cannot pass this screen.[5]

[5]As the State of Oregon has frequently pointed out to the Commission (including its Comments on the previous round of rulemaking in this proceeding), numerous fake NCEs are applying for stations on the reserved and non-reserved band. It is necessary to weed these out, but the Commission staff has been unable or unwilling to do so. Paragraph 309(j)(6)(E), however, requires the Commission to use "threshold qualifications," which could include evidence of nonprofit status and a showing of educational program advancement, as a screening device.

Second, the Commission could require the NCE applicants that remain to go through a point system[6] determination to pick the best-suited NCE applicant for the frequency, and, perhaps simultaneously, conduct an auction among commercial applicants to determine the highest bidder. The funds to be collected can be held in escrow until a final determination is made.

Third, the FCC staff, as directed by paragraph 309(j)(6)(E) would then utilize engineering solutions, negotiations, and other means suggested by that paragraph to avoid or resolve the mutual exclusivity between the winning NCE and commercial applicant. One factor at this point could be that, if the NCE would provide first or second NCE service to the area, the frequency would be awarded to the NCE applicant. Other significant factors, all suggested by the rules of construction and other Congressional directives found in subsection 309(j), could be the degree of concentration in the market and the number of stations licenses held by the commercial applicant.

An *NPRM* that focuses on these directives, instead of focusing solely on the revenues to be obtained from auctions and competitive bidding, could help develop meaningful factors the Commission should use when both NCE and commercial entities apply for the same frequency.

VIII. Conclusion

For all the above reasons, but chiefly because there is no legislative support for its proposals, the Commission should discard its three "options" and, instead, design and develop a system for making determinations between NCE and commercial applicants for frequencies within the non-reserved band which honors and adheres to the letter and spirit of Congress' limited grant of competitive bidding authority. The Commission's next proposal should show less regard and consideration for the revenues to be obtained from auctions and more regard for

[6]Although the State of Oregon remains one of the challengers to the present NCE point system among the petitions for review still pending before the Court of Appeals for the D.C. Circuit (*American Family Association, et al., v. FCC* (Case No. 00-1310), it believes that a point system which focuses on such factors as local and/or regional origination of programming among the points to be used, is the appropriate means for making determinations among mutually-exclusive NCE applicants.

the public interest and the various factors Congress has pointed to as the way in which the Commission should implement that authority.

Respectfully submitted,

THE STATE OF OREGON, Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University

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